

U.S. Department of Labor

**Board of Contract Appeals
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In the Matter of

AURORA ASSOCIATES, INC.,
Appellant

Contract No. 99-1-2167-43-27

Date: March 11, 1997

Case No. 88-BCA-2

For Appellant:

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BEFORE: MILLER, LEVIN
Miller, Member, Board of Contract Appeals

DECISION AND ORDER

By letter dated July 11, 1988, Aurora Associates, Inc. submitted to this Board a notice of appeal of a Contracting Officer's Final Decision dated April 26, 1988, in which the Contracting Officer disallowed \$123,299.50 of General and Administrative costs. By agreement of the parties, this case is submitted for decision on the basis of a Joint Statement of Facts, reproduced below and adopted, as appropriate, as findings of fact. We have made additional findings of fact where

necessary, based on documents contained in the Appeal File (“AF”) and documents submitted by the parties. No formal hearing was held.

Joint Statement of Facts

1. On December 31, 1980, Aurora Associates, Inc. (“Aurora”) and the U.S. Department of Labor (“USDOL”) entered into a cost reimbursement contract, Number 99-1-2167-43-27 (“the Contract”). The effective period of the Contract was from January 1, 1981 to June 30, 1984.

2. Upon completion of the Contract and after submission of close-out forms, \$123,299.5[0] of claimed costs were disallowed by a USDOL Contracting Officer, in a written Final Decision dated April 26, 1988. This amount is the difference between the General and Administrative costs requested by Aurora for reimbursement and the dollar ceiling amount applicable to such costs (\$1,055,079) as specified in the Contract, as modified.

3. There were 18 modifications to the Contract. Of these, Modifications 6 and 13 are of particular relevance to the matter in dispute, namely, to the issue of those indirect costs classified as General and Administrative (“G&A”) costs.

4. From the original Contract through Modification Number 4, the allocable base upon which the parties agreed to establish G&A rates pursuant to Clause 34 of the Contract was simply “total costs incurred.” Modification Number 5, dated March 9, 1982, further broke down these “total costs incurred” into two separate categories: “G&A costs” and “subcontractor costs.”

5. Modification Number 6, dated March 31, 1982, signaled a change in the agreed upon base of G&A rates for this Contract and states, in pertinent part, as follows:

The base for the provisional G&A rate of 14.8% is changed from “total cost incurred” to read “total cost incurred less subcontract costs.”

A new provisional G&A rate of 4.8% as applicable to subcontract costs incurred is established for the period January 1, 1982 through December 31, 1983.

6. Also, for the first time in this Contract, Modification 6 established a G&A dollar ceiling amount, pursuant to paragraph (g) of Clause 34 of the Contract.

7. Paragraph (g) of Clause 34 of the Contract, referred to in Paragraph No. 6, above, provides that:

In no event shall . . . indirect expense[s] exceed the specified dollar ceilings.

8. Modifications 6 through 12 calculated the G&A ceilings by using the G&A base of “total costs less subcontract G&A costs.”

9. Several audits of Aurora's books and records were performed during the Contract period in dispute by the Defense Contract Audit Agency ("DCAA"). The G&A allocation bases of the relevant audits, are reflected in the reports of such audits as "total cost input."

10. The provisional and final "indirect cost" rates (percentages) applicable to the Contract were negotiated periodically between the parties. All but one of the indirect cost rate agreements negotiated by the parties during the time of this dispute (dated: March 20, 1981, November 1, 1982, February 23, 1983, November 25, 1983, respectively) contained the G&A base of "total cost input" or "total cost incurred." The only exception was the indirect cost rate agreement dated April 2, 1982 in which the parties agreed to a provisional G&A base of "total costs incurred less subcontractor's costs." This was the indirect cost rate agreement just preceding that of February 23, 1983.

11. On February 23, 1983, Aurora and the Office of Cost Determination of USDOL entered into an indirect cost agreement ("Agreement"). In this Agreement new provisional and final indirect cost rates were established for the categories of overhead, subcontractor costs, G&A costs, and fringe benefits for the years 1978 through 1983, which were listed in chart form on the face of the Agreement. The base of G&A costs was denoted on the face of the Agreement only as "(c)," with a cross reference to another page of the Agreement that explained: "(c) total cost input."

12. In addition to containing new indirect cost rates and bases, the February 23, 1983 Agreement contained provisions regarding fixed rates or ceiling amounts, as follows:

Contracts/grants providing for ceilings to the indirect cost rate(s) or amount(s) which are indicated in Section I, above, will be subject to the ceiling stipulated in the contract or grant agreements.

If a fixed rate is contained in this agreement it is based on an estimate of the cost which will be incurred When the actual costs for such period have been determined an adjustment will be made in a subsequent negotiation to compensate for the difference between those costs . . . and actual costs.

13. On June 20, 1983, Aurora submitted a Contract modification request to the Contracting Officer, for what would be Modification 13 (the "Modification"). The Modification was requested because Aurora anticipated that its funds for labor would be exhausted by September 10, 1983, as a result of the detailing of tasks and subtasks by the Job Corps (such as changes in training schedules, substitution of courses and other similar technical direction). In its request, Aurora asked only for a reallocation of funds among Other Direct Cost ("ODC") categories and from these ODC's to the Direct Labor category. Further, in subsequently referring to its Modification request, Aurora stated (in its letter of September 7, 1983) that it had not sought any additional funding in Modification 13.

14. In letters dated September 7th and 9th, 1983, Aurora alerted the Contracting Officer to the impending exhaustion of funds for Direct Labor as the modification request had not yet been fulfilled, and explained that Aurora would continue to perform on the Contract in good faith, based on its understanding that the Modification would be processed shortly. In a letter to the Contracting Officer dated September 13, 1983, Aurora confirmed a telephone conversation of the day before between the parties, and stated that, notwithstanding the exhaustion of monies for Direct Labor, Aurora understood that it was the "Contract Officer's expectation and desire to continue to perform on the Contract in the interim."

15. Modification 13 was signed on September 22, 1983. The Modification provided for the reallocation of funds among direct cost categories, as requested by Aurora, and did not increase the total Contract cost. In addition, the reallocation affected the category of indirect costs.

16. In all, the reallocation of Modification 13 was achieved by increasing the Direct Labor cost category in the amount of \$103,339 and by correspondingly decreasing the (direct cost) categories of staff travel, consultant fees and travel, materials and supplies, as well as the (indirect) category of G&A costs. G&A costs were decreased by \$14,754. The overall Contract price was decreased by \$275.

17. Modification 13, on page one, contains language to amend the indirect cost rate structure, as follows:

Part III, Section H: General Provisions Clause 34
NEGOTIATED OVERHEAD RATES as revised in Modification No. 6 is modified further as follows:

<u>TYPE</u>	<u>FROM</u>	<u>TO</u>	<u>RATE</u>	<u>LOCATION</u>	<u>APPLICABLE TO</u>
<u>General & Administrative (G&A)</u>					
Final	1/1/81 - 12/31/81		14.97%(c)	ALL	DOL Programs
Prov.	1/1/82 - 12/31/82		14.09%(c)	ALL	DOL Programs
Prov.	1/1/83 - 12/31/83		14.09%(c)	ALL	DOL Programs

On page two of the Modification, it states:

Basis

- (a) Direct labor plus fringe benefits.
- (b) Direct labor.
- (c) Total cost input.
- (d) Total subcontractor's cost.
- (e) Total labor costs.

These provisions of Modification 13 were the same as those in Section I of the February 23, 1983 Indirect Cost Agreement.

18. Modification 13 also contained language as follows:

As specified in paragraph (g) of this Clause 34 . . . a G&A Ceiling of \$910,300 [is] hereby established.

This G&A ceiling of \$910,300 was calculated using the G&A base of “total cost input less subcontract costs” which had been used in Modifications 6 through 12. On page one of Modification 13 the language states that Modification 6 was to be modified by re-employing the “total cost input” base for G&A. However, in the budget of Modification 13, the “total cost input” base was not used in calculating the G&A ceiling of \$910,300. With respect to all these differences, it is the Contracting Officer's contention that the G&A dollar ceiling amount controls under this Contract whichever calculation was used.

19. On October 28, 1983, the DCAA transmitted to USDOL a copy of their audit report of Aurora's claimed costs for calendar year 1982 (Audit Report # 6131-3B160.078). The final recommended DCAA G&A rates were determined by using a base of total incurred costs, excluding G&A expenses. The report stated, in pertinent parts:

The claimed subcontract G&A rate is questioned in its entirety because (i) the contractor does not maintain a separate pool to accumulate costs related to subcontract administrative costs and (ii) the claimed subcontract G&A expenses of \$62,608 were just an arbitrary allocation to the incurred subcontract costs in CY 1982.

The questioned 3.08 percent normal G&A rate resulted from adding back the claimed subcontract G&A expense to the normal G&A expense pool and adding back the incurred subcontract costs to the normal G&A allocation base as follows:

	<u>Expenses</u>	<u>Base</u>	<u>Rate</u>
Claimed	\$527,969	\$3,280,294	16.10%
Questioned	(\$62,608)	(\$1,257,197)	03.08%
Recommended	\$590,577	\$4,537,491	13.02%

() Denotes upward adjustment.

20. On November 21, 1983, the DCAA transmitted Audit Report Number 6131-4B 210.052 to USDOL, the purpose of which was to evaluate the price of the Contract. Actual audited and allowable costs for CY 1981 and 1982, actual unaudited costs through October of 1983 and estimated costs for November and December 1983 were evaluated by DCAA. With respect to the

G&A calculations and allocation, the report again questioned the use of a separate category of subcontract G&A costs because Aurora does not maintain these costs as a separate category on its books, and therefore just assigned an arbitrary allocation to that category.

21. The conclusion of the DCAA audit report identified in Paragraph 20, above, were “proposed” by DCAA and “set out so that Mr. Edward Tomchick, Contracting Officer, can make whatever budget realignment he determines necessary and justified.”

22. On November 25, 1983, USDOL entered into a new indirect cost rate agreement with Aurora in which the G&A base was “total cost input.” This agreement set final rates for 1982 and provisional rates for 1983.

23. All modifications after Modification 13 contain G&A ceilings that were calculated by using the applicable “total cost input” as a base. Further, all the subsequent modifications, as they relate to funding, show an increase in the Contract price.

24. The ceiling amount of G&A costs of Modification 13 was calculated by using the G&A rate that was specified in the February 23, 1983 Indirect Cost Rate Agreement but not the “total cost input” base of either the Agreement or of the Modification itself. The base of “total cost incurred less subcontractor's costs” was used to arrive at the G&A ceiling in Modification 13, as it had been in Modifications 6 through 12. This is what Aurora alleges as the “mistake” upon which it substantially bases its claim for relief.

25. Aurora alleges that it was the purpose of the language in Modification 13 to revise Modification 6 by employing the “total cost” input base for G&A.

26. Modifications 14 through 18 did not calculate the G&A ceiling de novo, but only calculated the additional G&A of each particular modification and added it to the previous ceiling.

27. By letter dated December 4, 1983, Aurora gave USDOL formal notice of an anticipated cost overrun of approximately \$141,000. Aurora contends that this notice referred exclusively to G&A costs. The Contracting Officer cannot so determine.

28. The alleged specific “mistake” in the calculation of allowable G&A costs was not discovered by Aurora until 1987, when it was informed by USDOL's Closeout Division that its G&A costs had exceeded the allowable G&A ceiling amount of the Contract. At that time Aurora conducted an analysis of the Contract expenditures and terms and determined that the claimed G&A cost overrun was due to the “mistake” as described in Paragraphs 18 and 24 of this Stipulation.

Additional Findings of Fact

29. By letter dated February 22, 1982, Aurora's Comptroller requested the establishment of a G&A cost rate for its subcontract costs, with the base being subcontract costs. The Comptroller proposed that the base for provisional G&A cost rates would change from total costs incurred to total costs incurred less subcontract costs. The Comptroller contended that the establishment of a subcontract G&A cost rate would decrease the indirect cost to the Department, and provide a more cost-effective means of allocating actual costs. (CO Reply Brief, Exh. 1.)

30. Modification 6 stated that "[a]s specified in paragraph (g) of this Clause 34, an Overhead Ceiling of \$914,362 and a G&A ceiling of \$683,337 are established. These ceilings may be adjusted upon establishment of a final overhead rate except that no adjustment will result in costs in excess of the total estimated cost plus fixed fee of \$6,302,303." (AF 122.) The numbers contained in this provision of Modification 6 were changed in subsequent modifications, but the provision itself was not changed.

31. Similarly, paragraph C of the February 23, 1983, Indirect Cost Agreement stated, in its entirety, that "[i]f a fixed rate is contained in this agreement, it is based on an estimate of the cost which will be incurred during the period for which the rate applies. When the actual costs for such period have been determined, an adjustment will be made in a subsequent negotiation to compensate for the difference between those costs used to establish the fixed rate and actual costs." (AF 37.)

32. Aurora's June 20, 1983 request for Modification 13 included a proposed budget reallocating funds among Other Direct Cost categories and from selected Other Direct Cost categories to Labor, without additional funding. (CO Reply Brief, Exhs. 2, 3, 4 and 5.)

33. When Aurora submitted the request for Modification 13, the Contract Specialist, acting on behalf of the Contracting Officer, approved the request, and revised the contract budget to reflect the reallocation of funds requested by Aurora and to incorporate the indirect costs rates contained in the February 23, 1983, Indirect Cost Agreement. (Affidavit of Bonnie Coe.) However, the Contract Specialist calculated the estimated G&A cost budget and ceiling using a base of total costs incurred less subcontract costs instead of the previously negotiated base of total cost input contained in the February 23, 1983, Indirect Cost Agreement and the language amending the indirect cost rate structure on page one of Modification 13. (CO Reply Brief, Exh. 6; AF 35-6, 196.)

34. The \$910,300 G&A cost ceiling specified in Modification 13 of the Contract was clearly and unambiguously stated on Modification 13's budget page. The method of calculation of the G&A cost ceiling was also explicitly disclosed on the bottom of Modification 13's budget page as follows:

G&A Subcontract - $167,845 \times 4.8\% = 8057$
G&A all other - $(-)153,091 \times 14.9\% = (-)22,811$

(AF 207.)

35. The Contract's final budget, attached to Modification 16, contained an estimated G&A cost budget and ceiling of \$1,055,079, based on the Contract Specialist's erroneous calculation, and a "total estimated cost including fixed fee" of \$9,698,415. (AF 242.) Although subject to change upon the establishment of final indirect cost rates, this ceiling served as the basis for the Contracting Officer's claim.

36. According to Aurora's January 2, 1985 close-out invoice, Aurora's actual G&A costs for the term of the contract were \$1,178,378.56, and its actual "total contract costs including fixed fee" were \$9,712,194.23. A comparison of Aurora's actual costs and the estimated costs contained in the final budget, attached to Modification 16, results in a G&A cost overrun of \$123,299.56, and a "total contract cost including fixed fee" overrun of \$13,779.23. (AF 267.)

37. By letter dated June 17, 1987, Aurora notified DOL of its discovery of the calculation error in Modification 13. Aurora stated in its letter that the G&A cost ceiling in Modification 13 should have been \$1,062,747 instead of \$910,300, a difference of \$152,447. The Contracting Officer does not dispute this calculation as being made in conformity with the requirements of Modification 13 and the February 23, 1983, Indirect Cost Agreement. (AF 21-2.)

38. If the amount of the calculation error (\$152,447) is added to the final estimated G&A cost ceiling contained in Modification 16 (\$1,055,079), the final estimated G&A cost ceiling would be \$1,207,526. Aurora claimed a lesser amount of \$1,178,379 in G&A costs. If the G&A cost ceiling had been correctly calculated in Modification 13, Aurora's claimed G&A costs would have been within the properly calculated G&A cost ceiling prescribed by the Contract. (AF 21-2, 222, 242, 267.)

39. Because the "total estimated cost including fixed fee" was a total of direct and indirect costs, including G&A costs, an increase in estimated G&A costs would result in an increase in the "total estimated cost including fixed fee." If the amount of the calculation error (\$152,447) is added to the final "total estimated cost including fixed fee" contained in Modification 16 (\$9,698,415), the final "total estimated cost including fixed fee" would be \$9,850,862. Aurora claimed a lesser amount of \$9,712,194.23. If the G&A cost ceiling had been correctly calculated in Modification 13, no overrun would have occurred. (AF 21-2, 222, 242, 267.)

Discussion

Aurora seeks reformation of Modification 13, and all subsequent modifications, to correct the alleged error in the calculation of the Modification 13 G&A cost ceiling, and urges the Board to employ the doctrine of contra proferentem as a basis for reformation. Aurora argues that because

the Contracting Officer drafted Modification 13, the Contracting Officer assumed the risk of all ambiguities and inconsistencies, and therefore, Modification 13 should be construed against the Contracting Officer and in favor of Aurora. Sturm v. United States, 190 Ct. Cl. 691, 421 F.2d 723 (1970).

For this Board to apply the contra proferentem doctrine in this case, as Aurora argues, we must find that the Contracting Officer drafted Modification 13 and its attached budget. The record does not support such a finding. Aurora requested Modification 13, and submitted to the Contracting Officer a proposed budget. The Contract Specialist reviewed that modification, as proposed, incorporated the negotiated indirect cost rates of the February 23, 1983, Indirect Cost Agreement into Modification 13's budget, and calculated the new G&A cost ceiling using an incorrect formula. Although Aurora was not responsible for calculating the revised G&A cost ceiling in Modification 13, Aurora did have substantial input into the content of Modification 13. As was observed in an analogous case, “[w]e cannot charge the defendant with any ambiguities since plaintiff appears to have initially proposed the terms which are now disputed; but there was also considerable negotiation and the plaintiff does not seem to be so much the author that it should bear, on that account, the brunt of uncertainties.” Deloro Smelting & Refining Co. v. United States, 161 Ct. Cl. 489, 317 F.2d 382 (1963). Under the facts of this case, we cannot apply the doctrine of contra proferentem.

Aurora also contends that a mutual mistake occurred in Modification 13, and Modification 13, and all subsequent modifications, should be reformed on that basis. Based on the established facts of this case, the Board finds, however, that the mistake that occurred was a mistake in the integration of the February 23, 1983, Indirect Cost Agreement into Modification 13. The General Services Administration Board of Contract Appeals (“GSBCA”) has made the following pertinent observation regarding such mistakes in integration:

Indeed, the distinction between unilateral mistake and mutual mistake really has no application whatsoever to reformation of a writing for a mistake in integration. Evidence of an antecedent agreement and a writing at variance with that antecedent agreement is all that is required, because the element of mutuality is subsumed by the antecedent agreement and the element of mistake is subsumed by the variation between the antecedent agreement and the writing.

Gresham Sand & Gravel Co., GSBCA No. 6859-R, 84-2 BCA ¶ 17,359. Furthermore,

The Restatement (Second) of Contracts, Section 155 (1979), provides that a writing that fails to express the parties’ agreement “because of a mistake of both parties as to the contents or effect of the writing” may be reformed to express the agreement that the parties intended it should. Reformation is to be granted only where an antecedent expression to which the parties agreed is clearly and convincingly demonstrated.

Gresham Sand & Gravel Co., GSBCA No. 6858, 84-1 BCA ¶ 17,019, citing Pauley Petroleum, Inc. v. United States, 219 Ct.Cl. 24, 591 F.2d 1308 (1979), Fraass Surgical Manufacturing Company v.

United States, 215 Ct.Cl. 820, 571 F.2d 34 (1978); Jamsar, Inc. v. United States, 194 Ct.Cl. 819, 442 F.2d 930 (1971); Wind Ship Development Corp., DOTCAB No. 1215, 83-1 BCA ¶ 16,135.

In the present case, the parties agreed prior to the execution of Modification 13 that allowable G&A costs would be calculated on the basis of total costs incurred, instead of total costs incurred less subcontract costs. This agreement was in conformance with the recommendations of the Defense Contract Audit Agency, and is reflected in the February 23, 1983, Indirect Cost Agreement and on page one of Modification 13. The Contract Specialist who processed Aurora's request for Modification 13 did not implement the changed base for determining allowable G&A costs, and used an incorrect formula for calculating the G&A cost ceiling. Such an error can be corrected by reformation of the contract documents to reflect the actual agreement of the parties. The record in the present case clearly and convincingly establishes the actual agreement of the parties and demonstrates that reformation of Modification 13, and all subsequent modifications, to reflect the correct G&A cost ceiling is appropriate.

This case is factually similar to the case of Charles W. Ware, GSBCA No. 10,126, 91-1 BCA ¶ 23,286, where the GSBCA held that the amount of rent due under a lease agreement between the Appellant and the General Services Administration ("GSA") was incorrectly calculated, and that GSA was correct in reforming the lease agreement in order to correctly calculate the annual rent. In the original lease agreement, GSA erroneously calculated the annual rent based on 11,000 square feet although it was only leasing 9,916 square feet. GSA modified the inaccurate lease agreement to reflect the correct calculation. The GSBCA concluded that GSA properly modified the lease agreement to reflect the agreement of the parties to base the annual rent on actual square footage leased. Reformation is similarly appropriate in the present case.

The Contracting Officer places great emphasis on the fact that the purpose of Modification 13 was to reallocate funds among budget categories, and that Aurora specifically stated in its request for Modification 13 that it was not seeking an increase in the overall contract price. Modification 13 had two purposes, one requested by Aurora and one not. Aurora requested a reallocation of funds; Aurora did not request the integration of the February 23, 1983, Indirect Cost Agreement. In processing Aurora's modification request, the Contract Specialist took it upon herself to integrate that agreement into Modification 13. The integration of the negotiated indirect cost rates and the change in computation of allowable G&A costs would have resulted in an increase in the total contract price, regardless of the intent of Aurora in requesting Modification 13, because the base to which the G&A cost rate was applied would have increased with the inclusion of subcontract costs. In Modifications 6 through 12, subcontract costs were excluded from the base to which the G&A cost rate was applied. The Contract Specialist incorrectly incorporated a previous agreement of the parties because of her application of an incorrect formula, and that error must now be corrected so that the integrated contract may be properly executed.

The Contracting Officer also argues that Aurora is not entitled to reformation of Modification 13, and all subsequent modifications, because Aurora failed to promptly object to any defect in Modification 13, and failed to discover the error when it signed Modification 13 in 1983, despite the fact that the calculation was set out at the bottom of the budget page. We disagree.

Where reformation for mistake is sought premised on antecedent expressions of the parties at variance with the writing, the negligent failure of the party seeking reformation to read the document before signing, even though the mistake could have thereby been avoided, does not necessarily preclude reformation. In fact, the court has said generally that negligence is not a bar to reformation where the party against whom reformation is sought has become an unintended beneficiary, or where the Government has simply gotten too good a deal from a contractor's blunder.

Lea Company, GSBCA No. 5697, 81-2 BCA ¶15,208, citing Fraass Surgical Mfg. Co. v. United States, 571 F.2d 34 (Ct. Cl. 1978), Applied Devices Corp. v. United States, 591 F.2d 635 (Ct. Cl. 1979).

Aurora alleges that it did not discover the erroneous calculation until an investigation and recalculation which followed the Contracting Officer's disallowance of \$123,299.50 of claimed G&A costs, and it promptly brought that error to the attention of the Contracting Officer. There is nothing in the record which suggests that the error was discovered any earlier. There would have been no incentive to suppress such a discovery. The Contracting Officer does not dispute Aurora's assertions directly, and they are plausible under the circumstances. It is also noteworthy that the DCAA never discovered the error despite numerous audits during the effective period of the Contract.

The Contracting Officer further contends that the specified dollar ceiling for G&A costs is controlling for purposes of determining price overruns, regardless of how that ceiling was calculated. The Contracting Officer's argument is without merit. Paragraph C of the February 23, 1983, Indirect Cost Agreement which states that "[i]f a fixed rate is contained in this agreement, it is based on an estimate of the cost which will be incurred during the period for which the rate applies." Similarly, Modification 6 states that the G&A cost ceiling "may be adjusted upon establishment of a final overhead rate except that no adjustment will result in costs in excess of the total estimated cost plus fixed fee" These provisions were never changed by subsequent modifications. With the exception of Modification 13, the estimated G&A cost ceiling was always equal to Aurora's estimated G&A costs. This ceiling was subject to change based on actual costs incurred, but, as a practical matter, each estimated G&A cost ceiling was replaced by a subsequent estimated G&A cost ceiling. As a result, the Contracting Officer raised the G&A cost ceiling by a total of \$144,779 in Modifications 14 and 16. Although the final budget attached to Modification 16 has been treated as the final budget, it also was subject to revision based on Aurora's actual costs of performance. The Contracting Officer's argument that the G&A cost ceiling specified in Modification 13 is absolutely controlling is rejected.

Even if the applicable G&A cost ceiling was correctly calculated as \$910,300 and we treated Modification 16's budget as final, the Contracting Officer would not be able to recover the entire \$123,299.50 claimed. Because Modification 6 allows the G&A cost ceiling to be increased based on actual costs up to the Contract's "total estimated cost including fixed fee" (\$9,698,415), Aurora is entitled, at a minimum, to be paid its actual costs of performance up to \$9,698,415.¹ If such an adjustment is made without correcting the erroneously calculated G&A cost ceiling, the total contract cost overrun is only \$13,779.23. If we allowed the Contracting Officer to recoup the entire \$123,299.50 claimed, Aurora would have to repay funds to which it is entitled under the terms of the Contract, and the Department of Labor would be unjustly enriched.

Order

For the foregoing reasons, Aurora's appeal is GRANTED. The April 26, 1988 final decision is remanded to the Contracting Officer for recalculation of the G&A cost ceilings prescribed by Modifications 13 through 18 on the basis of total costs incurred in conformity with the February 23, 1983, Indirect Cost Agreement.

Edward Terhune Miller
Member, Board of Contract Appeals

Stuart A. Levin
Member, Board of Contract Appeals

¹Although the parties have not raised this issue, the record does not conclusively establish whether Aurora has been paid the "total estimated contract cost" of \$9,698,415. Aurora claims that it received payments totaling \$9,616,075.05 as of January 2, 1985, and the Contracting Officer claims that it has paid Aurora a total of \$9,596,314.37 as of April 26, 1988. (AF 11, 270.) According to the Contracting Officer's records, Aurora would be entitled, at a minimum, to an additional payment of \$102,100.63, which would offset a significant portion of the Contracting Officer's claim. Aurora may also be entitled to additional compensation if the total estimated cost including fixed fee is adjusted to reflect actual costs as permitted by the Contract.